IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted
Suitable for Publication

AT MELBOURNE
CRIMINAL JURISDICTION

CR 18-01888

DIRECTOR OF PUBLIC PROSECUTIONS

v

RODNEY DAY

JUDGE:	HIS HONOUR JUDGE WRAIGHT
WHERE HELD:	Melbourne
DATE OF HEARING:	18 December 2018

DATE OF SENTENCE:	18 December 2018
CASE MAY BE CITED AS:	DPP v Day
MEDIUM NEUTRAL CITATION:	[2018] VCC 2201

REASONS FOR SENTENCE

Subject: Criminal Law - Sentence

Catchwords: One charge of obtaining a financial advantage by deception – providing false invoices – relatively serious example of this type of offence – funds used in attempt to salvage struggling family business – moral culpability in lower category – no relevant priors – genuine remorse – early guilty plea – appropriateness of suspended sentence

Legislation Cited: *Crimes Act* 1958, *Sentencing Act* 1991

Cases Cited: *DPP v Buhagiar and Heathcote* [1998] 4 VR 540

Sentence: Total effective sentence of 15 months imprisonment, sentence wholly suspended for a period of 2 years

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APPEARANCES:	Counsel	Solicitors
For the Director of Public Prosecutions	Ms T Saville	OPP
For the Accused	Mr J Saunders	Valos Black & Associates

HIS HONOUR:

Introduction

1 Rodney Edward Day, you have pleaded guilty to one charge of obtaining a financial advantage by deception contrary to s 82(1) of the *Crimes Act* 1958, which carries a maximum penalty of 10 years imprisonment.

2 You have also admitted your prior Criminal Record.

Circumstances of the offending

3 A summary of Prosecution Opening was tendered on the plea and may be summarised as follows:

4 On 17 February 2010 you Rodney Day, made an application for finance to Macquarie Leasing through finance broker Robert Greenwood for Telegraph Gisborne Pty Ltd. You supplied an invoice in the name of Robert Duggan for $122,241.65.

5 Mr Duggan is the director of PJ Duggan Building and Construction Pty Ltd whose work includes hotel construction. He uses sub-contractors to supply and install all aspects of building and construction within various hotels.

6 The invoice contained details of items purported to be supplied by Mr Duggan. You created the invoice and included your personal bank account details instead of those of Mr Duggan and signed the invoice attempting to replicate the signature of Mr Duggan.

7 The loan was approved and $122,241.65 was deposited into your bank account on 19 February 2010.

8 On 18 May 2010, you made an application for finance to Macquarie Leasing through Mr Greenwood for Bells South Melbourne Pty Ltd. You supplied an invoice in the name of Mr Duggan for $149,922.30.

9 The invoice contained details of items purported to be supplied by Mr Duggan. You also provided a deposit slip in the name of Mr Duggan containing your bank account details.

10 The loan was approved and $149,922.30 was deposited into your bank account on 20 May 2010.

11 On 2 July 2010, you made a second application for finance to Macquarie Leasing through Mr Greenwood for Telegraph Gisborne Pty Ltd. You supplied an invoice in the name of Mr Duggan for $38,208.50.

12 The invoice contained details of items purported to be supplied by Mr Duggan. You also provided a deposit slip in the name of Mr Duggan containing your bank details.

13 The loan was approved and $38,208.50 was deposited into your bank account on 6 July 2010.

14 On 30 July 2010, you made a third application for finance to Macquarie Leasing through Mr Greenwood for Telegraph Gisborne Pty Ltd. You supplied an invoice in the name of Mr Duggan for $39,910.50.

15 The invoice contained details of items purported to be supplied to the business by Mr Duggan. You created the invoice and included your personal bank account details instead of those of Mr Duggan and signed the invoice attempting to replicate the signature of Mr Duggan.

16 The loan was approved and $39,910.50 was deposited into your bank account on 4 August 2010.

17 The total amount paid into your bank account was $350,282.95. You made repayments totalling $58,620.79 prior to the liquidation of your company. The outstanding amount owed to Macquarie Leasing is $317,707.67.

18 After you ceased making payments Macquarie Leasing conducted internal investigations which discovered that you had falsified invoices in the name of Mr Duggan whom had not received the funds. Macquarie Leasing reported the matter to Victoria Police.

19 Mr Duggan provided a statement to the police indicating that the invoices contained his logo and ABN but were not invoices that he had issued. The numbering system was inconsistent with his invoices and the banking details did not belong to him.

20 Police obtained bank statements of the account details that you had provided Macquarie Leasing on the invoices and bank slips. These statements show that the funds were received by you.

21 On 26 November 2012, you were arrested and participated in a record of interview at the Flemington Police Station. You made a no comment record of interview but indicated that you wished to make a further statement.

22 On 28 November 2012, you attended the Flemington Police Station and participated in a record of interview where you made full admissions. You stated amongst other things:

- That you knew the wrongfulness of your actions, but your family was desperate;
- You created the fraudulent invoices so that the funds would be paid to your personal account;
- If the finances were paid into a business account the bank would take the money as they were in financial trouble at the time;
- The money was spent on products and services listed in the invoices for the hotels however they were cheaper versions of those listed to enable the money to stretch further;
- You had no intention of spending the money on personal items; and
- You had been paying the loans off with regular payments until the company went into liquidation and you could no longer afford to continue paying.

Objective seriousness of the offence

23 The single charge on the indictment represents four separate instances where you made applications to Macquarie Leasing through a finance broker over about a five month period by providing false invoices. The amount of money obtained by your deception is significant and in my view represents a relatively serious example of this type of offence. However there are some aspects to this offending which must be taken into account in assessing your moral culpability.

24 At the time of the offending your family business which had been very successful, was undergoing significant financial hardship. As is evidenced by the answers in your record of interview, you had no intention of spending the money on anything personal, rather the funds were used in a desperate attempt to salvage your family's business. Further, following investigation there is no evidence that funds were not used in this way. As such, you began to make the required repayments after the loans were obtained and it would seem your intention was to continue repayments. Unfortunately, your business went into liquidation which ultimately led to the discovery of your deceptions.

25 While the total amount of money received clearly makes your offending serious, in my view your moral culpability can be assessed as in the lower category. As noted, there is no evidence of using the funds obtained for any personal spending or directing the money to any purposes other than for what the lending institution understood it to be used for.

26 Thus while I view your offence as serious, I accept that you committed the offence while in a desperate state and not in order to fund a lifestyle or to direct the monies to any purpose other than for which they were intended that is, to try and save your business, which was ultimately unsuccessful.

27 A Victim Impact Statement was prepared on behalf of Macquarie Leasing Ltd and tendered on the plea. The statement simply confirms the loss to Macquarie as

outlined above that is, the amount of $317,707.67.

Personal circumstances

28 You are now 51 years of age. You grew up in a traditional working family; your father was a plumber and your mother a cleaner. You have one sister who is a year older than you.

29 The first three years of your life were spent in the Deer Park area and in 1970 your family moved to Mildura where they had bought a motel after selling the family home. Two years later they sold the business and moved back to Melbourne in order to take over another motel in Essendon where the family lived for four years. Your family then moved into the hotel business.

30 Your parents' marriage broke down before your father left the family home in around 1980. This was a difficult time for you and you felt very self-conscious at your school as the only one amongst your peers who was from a separated family. Nonetheless your parents were able to maintain a good relationship and continued as business partners.

31 You attended St Theresa's Primary School in Essendon and completed your secondary schooling at St Bernard's College in West Essendon.

32 You had a relatively normal childhood. You had many friends at school and were a gifted sportsman excelling in athletics, football and cricket from a very young age. In addition to school sports, you were successful in athletics and you were captain of the junior football team. Later you represented Victoria in athletics and played senior football. You continued your interest in sport and athletics playing club competitions up to the age of 25 and then professional competitions to the age of 30.

33 From about the age of 14 you worked part-time in the family’s hotel business. After leaving school you completed a year of an accountancy internship but decided against that as a career instead working in one of the family's hotels, quickly being

promoted to a manager at the age of 21 in charge of some 40 staff.

34 You were married at age 23 and have had a happy relationship which is now under strain due to the difficulties you have been battling since the collapse of the family business. You have one daughter who is aged 14 and a son aged 11. You have been actively involved in family life volunteering in both your children's sporting activities.

35 From the early 1990s the family business interest expanded and you continued in a managerial role working long hours and often overseeing two hotels concurrently. Ultimately, you took over most of the responsibility for the business and your father began to play more of a backseat role.

36 Your family business was involved in a number of hotels through the 1990s and early 2000s including the Essendon Grand Hotel, the Anglers Tavern in Maribyrnong and the All Seasons Hotel in Bendigo. In 2007, the family purchased the Mildura Grand Hotel and three other hotels. One of those hotels resulted in a loss as it became evident after purchase that the vendor had failed to accurately represent the takings of the business. With the impact of the global financial crisis around the same time, pressure was put on the business and you began to notice signs of decline in late 2008.

37 In 2010, after further decline in the business you engaged an administrator to help reduce ongoing expenses and to keep the business viable. However the bank chose to place the business into receivership in 2011. You went into bankruptcy from 2011 to 2014. In this regard I note that the dates on the indictment that is February 2010 until August 2010, was at a time when your business was going through this very difficult financial period and just prior to going into receivership.

38 Understandably, throughout this period your mental health began to suffer. You felt responsible for the family business and kept many of the difficulties to yourself as you did not want others in the industry to be made aware of your financial predicament.

39 In a psychological report prepared by David Warmington and tendered on the plea, Mr Warmington reports that as a self-made man you were immensely proud of your business achievements, that you had not encountered failure in your life up to this point and that you did not know how to cope with it. Mr Warmington observes that your whole identity was wrapped up in the business success and as such, you have been unable to come to terms with its failure.

40 As the business began to collapse you also began to use alcohol heavily. Within months you were consuming up to two litres of wine nightly. In the years since bankruptcy you have continued to drink excessively consuming two bottle of wines nightly and sometimes more. In September 2016, you were admitted to hospital after an alcohol-related seizure and have had other hospital admissions as a result of your alcohol abuse. You commenced counselling in June 2017 and have made repeated efforts to limit your alcohol use interrupted by serious relapses. As noted, you have been hospitalised on a number of occasions due to alcohol intoxication.

41 You have been in regular counselling sessions with Mr Warmington since June 2017. Mr Warmington assesses you as continuing to experience ongoing depression and anxiety together with alcohol abuse issues. He notes that you continue to ruminate about the business collapse and about mistakes you have made feeling regretful on a daily basis. While he is providing you with assistance, he also recommends that you would benefit from an inpatient rehabilitation program.

42 Mr Warmington has had the benefit of seeing you over a long period of time and in his view, you are highly unlikely to reoffend as the offence was out of character and intrinsically linked to your business collapse. He observes that you have expressed sincere remorse for your actions in defrauding the bank and its shareholders and taking up the time of investigators and police. He also notes that you have expressed profound regret regarding unpaid debts to creditors and unpaid wages to your staff, and also the stress and anxiety that you have caused to your family.

Sentencing considerations

43 In this instance, and in deception cases generally, general deterrence is a central sentencing consideration. Financial institutions are entitled to rely upon representations made to them. Conduct of this kind affects the community by way of making it more difficult for people to obtain finance. These offences are also difficult to detect. Persons in the financial community and would-be borrowers should understand that an offence of this kind will not be treated leniently by the courts and may result in a sentence of imprisonment. As such, general deterrence must therefore play an important role in the sentencing process. Just punishment and denunciation of your conduct are also relevant sentencing considerations in this instance.

44 As to specific deterrence, in all the circumstances in my view should carry very little weight. You have one prior matter which is irrelevant to the offending here. Furthermore, you have suffered significant loss since the detection of this offence and you are no longer involved in the business world. In my view this offence has already had a significant deterrent effect on you.

45 I take into account your plea of guilty. From the outset you have been cooperative with the police making full admissions and ultimately pleading guilty at the earliest opportunity once charges had been served. Your plea has saved the community the time and expense of a trial and has facilitated the course of justice.

46 Over and above your plea of guilty, I accept that you have expressed genuine remorse and have insight into your offending. The fact that you yourself were involved in business has given you some understanding about the loss you have caused to the bank and its shareholders and you have expressed as much as noted above to your psychologist.

47 Mr Saunders who appeared on your behalf, submitted that delay has significance in the sentencing equation. These offences occurred in 2010. You were interviewed in

November 2012. There was a five and a half year period between the offence and ultimately being charged, the charge not being laid until 16 May 2018. In the circumstances I accept that delay does have significance in this instance and was in no way attributable to you. This was a case where you made full admissions when interviewed in 2012 and had to then revisit the matter when charges were ultimately laid many years later. Nonetheless, I take into account the fact that in the period between being interviewed and this matter coming to its ultimate conclusion, you have not reoffended. Further, in the intervening period while awaiting the outcome of this matter you have continued to battle the anxiety, depression and alcohol addiction that developed following the failure of the business while the prospect of a gaol term hung over your head.

48 As to your prospects of rehabilitation, in my view they should be assessed as very good. You have some hurdles to overcome in terms of your alcohol addiction, however while that has become a problem since the offence, it was not a motivator or contributor to your offending. It is clear you have insight into your offending and in the time that has passed, you have moved on and begun to address your difficulties through counselling.

49 Mr Saunders submitted that a period of imprisonment is called for however as the offence was committed in 2010, the period of imprisonment is able to be and should be, wholly suspended. Ms Saville who appeared on behalf of the Director of Public Prosecutions submitted that any sentence imposed should include a period of actual imprisonment.

50 In all the circumstances in my view a sentence of imprisonment is called for however, the relevant and applicable sentencing considerations in this case are able to be met by the imposition of a wholly suspended period of imprisonment. In *DPP v Buhagiar and Heathcote*[1], Batt and Buchanan JJA said the following in relation to suspended sentences which is apposite in your case:

[1] [1998] 4 VR 540 at 547 (citations omitted).

> A suspended sentence of imprisonment is not an unconditional release or a mere exercise in leniency. Rather it is an order made in the community's interest and generally designed to prevent re-offending. In deciding whether to suspend in whole or in part a term of imprisonment a judge is deciding whether, in all the circumstances, the offender should have the benefit of a special opportunity for reform, to rebuild his own life, or to make some recompense for the wrong done, or should have the benefit of mercy to which King CJ referred in *R v Osenkowski*, or for some other sufficient reason should have this particular avenue open to him, provided the conditions of the suspension are observed.

Sentence

51 Mr Day please stand.

52 Rodney Edward Day, on charge 1, obtain financial advantage by deception, you are convicted and sentenced to 15 months imprisonment. That sentence will be wholly suspended for a period of two years.

53 I am required to warn you that if you commit any offence punishable by imprisonment whether in or outside of Victoria during the period of suspension, you will be brought back to this court to be dealt with. In that circumstance, unless you are able to provide exceptional circumstances, that sentence will be restored and served.

54 Pursuant to s 6AAA of the *Sentencing Act* 1991, if not for your plea of guilty I would have sentenced you to a period of 18 months imprisonment with a non-parole period of 9 months.

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